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ANNUAL PROGRESS REPORT
WATER LEASING STUDY

1999

Submitted to:

Montana Environmental Quality Council
Montana Department of Natural Resources and Conservation
and
Montana Fish, Wildlife and Parks Commission

Submitted by:

Montana Fish, Wildlife and Parks
Fisheries Division

December, 1999

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I. INTRODUCTION

According to 85-2-436(3)(a), MCA, the Department of Fish, Wildlife, and Parks must complete and submit to the Department of Natural Resources and Conservation (DNRC), the Fish and Wildlife Commission (commission), and the Environmental Quality Council (EQC) an annual water leasing study progress report. The report must include specific information for each lease (which we interpret to mean for each new or renewed lease) including:

- **(i)** **the length of the stream reach and how it is determined;**
- **(ii)** **technical methods and data used to determine critical streamflow or volume needed to preserve fisheries;**
- **(iii)** **legal standards and technical data used to determine and substantiate the amount of water available for instream flows through leasing of existing rights;**
- **(iv)** **contractual parameters, conditions, and other steps taken to ensure that each lease in no way harms other appropriators, particularly if the stream is one that experiences natural dewatering; and**
- **(v)** **methods and technical means used to monitor use of water under each lease.** (85-2-436(1)(a), MCA)

Three new leases were negotiated in 1999, and one lease was renewed.

The progress report must also contain a summary of stream reaches designated by DNRC for study (pursuant to 85-2-437), and a summary of leasing activity on all designated streams. If no new leases have been obtained in the reporting year, FWP must "provide compelling justification for that fact" in the report. (Because FWP acquired three new leases in 1999, this last requirement is not relevant this year.)

The remainder of this report has been divided into six sections and associated appendices, described as follows:

Section II -- background on the creation of the leasing program;
Section III – what we feel were the highlights of the 1999 leasing year, including the new and renewed leases;
Section IV – additional detail on the 1999 new and renewed leases, including the statutorily-required reporting elements for each;
Section V – the statutorily-required reporting on the streams designated, so far, for study and potential leasing under FWP's leasing program; and
Section VI – a selection of program goals for 2000.

Appendix A is a matrix summarizing characteristics of all current FWP leases and water conversions.
Appendix B lists our leasing objectives, which is what we currently use to evaluate leasing offers, as well as actively seek additional lease opportunities.

II. WATER RIGHTS AND THE FWP WATER LEASING PROGRAM

Traditional water law in Montana focuses on the rights and procedures associated with removing

water from streams and lakes (appropriating) and putting that water to a beneficial use (e.g. irrigation, fish and wildlife, domestic, mining, etc.) away from the source. Persons who appropriate water from a stream must have a right or permit to do so. A right or permit specifies how much water can be diverted, for what purpose, during what time period, at what point on the stream, the location of the use of the water, and has a "priority date" assigned to it. The priority date determines who gets the water first; if there isn't enough to go around, the earliest date has the first claim (hence, the "first in time, first in right" maxim).

Except in basins that are closed to new appropriation, Montana's water law allows the Department of Natural Resources and Conservation (DNRC) to issue new permits to divert water if the applicant can show (among other things) that water is reasonably available for the use proposed and that there is a means to ensure persons with senior rights can get the water to which they are entitled. There is no flow level where new appropriations are no longer granted, nor does it specifically matter the extent to which there are other rights on the stream. If water can reasonably be expected to be available (even 1 in 10 years or less), a permit can be issued. The historic system, then, encourages maximum diversion and use of water from Montana's streams.

In the 1970s and 1980s, tools began to be developed to address public goals for retaining some water in certain streams to benefit the fishery. FWP was authorized to apply for instream "reservations" to support fishery values, and some instream flow rights were granted on streams then designated as blue-ribbon trout streams. FWP pursued the authority to reserve water, and was granted a series of reservations in the Yellowstone (1978 priority date), the Missouri River above Ft. Peck (1985 priority date), and the Lower and Little Missouri basins (1989 priority date). Although the reservations are a valuable management tool, they do not provide much assistance in drought conditions, due to their very junior priority status.

In 1988, areas of Montana suffered severe drought conditions, under which the level of diversion typically done in a normal year exacted severe tolls on several fisheries. Photos of fish kills due to stream dewatering hit the front pages of many Montana newspapers. These conditions spurred the 1989 Legislature to consider additional tools and incentives for water users to protect fishery values. The idea of allowing FWP on a temporary basis, to investigate the potential to lease formerly diverted water from a willing seller, to dedicate to instream flows under certain conditions, created a public policy controversy seldom seen in the halls of the Capitol. The concept was narrowly enacted, and since then FWP has pursued attractive leasing opportunities with willing lessors, in streams where dewatering issues significantly limit priority fisheries. These leases have rewatered many streams that traditionally had gone dry due to depletions, with most of these streams now making major contributions to area fisheries.

III. HIGHLIGHTS OF THE 1999 LEASING YEAR

Reflecting back on the 1999 leasing year, we feel there were some unique positive aspects to it, as well as the completion of three new leases and one renewal. These are described below.

- **Legislative Renewal and Expansion of FWP Leasing Authority.** During 1998, FWP staff worked with EQC staff and the EQC's 1997-98 Water Policy Subcommittee to complete the 10-Year "Final" Report required by the FWP pilot water leasing program statutes. It was titled the "Final" Report because the statute was scheduled to expire (unless renewed) in 1999, thereby ending FWP's ability to enter into new instream flow lease agreements.

  Through the thorough consideration and public involvement conducted by the Water Policy Subcommittee, a bill was introduced to the 1999 Legislature to: extend FWP's leasing authority for 10 more years; double the "cap" on the study streams DNRC could approve for us to lease from; extend the possible lease term for leases associated with "salvage" projects (e.g. lining a leaky diversion ditch) from 20 to 30 years; and require another "Final" Report in 2009. The bill received overwhelming support in both houses, and was signed by the Governor on March 19, 1999. We thank the EQC for its efforts to continue and support this program. (Note: Copies of the 1998 Final Report are available both from EQC and FWP staff, upon request.)

- **Three new water leases finalized.** Three new leases, though discussed in the 1998 Annual Report, were finalized in 1999. Two are on Big Creek (Yellowstone basin), and one on Rock Creek, near Garrison (Upper Clark Fork basin). We have high hopes for these leases, which are more fully described in Section IV of this report. The amount of water leased between these three totals 16 guaranteed cfs – a significant hydrologic contribution to streams that regularly went dry.

- **The first lease renewal and one more on its way.** Testament to the success of one of our earlier leases, Blanchard Creek (Blackfoot basin), the lessor and FWP agreed to renew it for 10 years, generally at the same payment level as the expiring 5-year lease. As our statutory authority limits us to one 10-year renewal, this lease opportunity will no longer be available after 2009, without statutory revision. We are currently working on another renewal (for 5 years) on Tin Cup Creek (Bitterroot basin), which we hope to report as a success in 2000.

- **New lease opportunities.** Word is getting out about FWP's instream flow leasing program. We received many inquiries in 1999, yielding several excellent lease opportunities. We are seriously pursuing instream leasing with water right holders on Little Prickly Pear Creek (Missouri basin below Holter dam), the mainstem Blackfoot River, Prickly Pear Creek (Missouri basin above Holter dam), Grave Creek (Kootenai basin), and interest is high in the Shields basin. We hope to report to you next year on leasing success in these areas.

- **Formal landowner ability to claim tax advantages for leased water.** Although FWP does not typically get involved in advising on tax implications of water leasing, it is our understanding that a federal tax deduction for dedicating water to instream flow can only be taken if the dedication is made "in perpetuity" (i.e. permanently). Since Montana's water statutes only allow water to be transferred to instream use on a temporary basis, tax advantages for a straight lease are questionable. In 1999, the permanent donation of water to a land trust, from which FWP leased the water for a 20-year period, allowed the landowner to take a federal tax deduction for the donation. The donation was valued at the cost of the

salvage project that created the excess (donated) water. The water will revert to the land trust upon expiration of the lease.

- **Getting the word out...** Given the broad support of the program voiced by the Legislature and the stakeholders that legislative staff coordinated with in the EQC's review of the FWP program, we felt somewhat more confident in putting more effort into promoting the program. We developed and presented an instream flow display, we've put more effort into communicating with other agencies and the media on leasing success stories, and we're encouraging others to get the word out as well. In that vein, enclosed are a selection of our new "Water for Fish^{+}" notepads, which we're using to thank all those who helped provide water for various fish species during 1999. The "+" refers to the fact that water left instream has a variety of benefits beyond the fishery, including wildlife, recreation, aesthetics, and the needs of downstream water users. We are pleased to note that there appear to be more persons interested in leasing, and more groups wishing us to provide them with information so they can consider how leasing might help them achieve their goals.

- **Improved coordination with other agencies and groups.** Whereas in the past, FWP pursued its leasing opportunities relatively independently, we are seeing increased interest in leasing from other agencies and programs (e.g Natural Resources Conservation Service (NRCS), U.S. Fish and Wildlife Service "Partners" program, Montana Land Reliance, Conservation Districts, etc.). Likely partially due to increased knowledge about leasing, other agencies are incorporating leasing opportunities into their coordination with landowners and bringing FWP into the project when such opportunities are ripe. This is a wonderful relationship for us, and also helps those agencies and entities provide multiple services to their cooperators.

- **Supporting leasing/conversion by others.** A first in 1999 was the assistance by FWP's Future Fisheries Improvement grant funding program – the same program through which we pay for new leases – in the partial funding of another entity (Trout Unlimited) for lease payments and to pay a landowner to conduct a temporary conversion of a water right to instream flow (under statutory authority granted in 1995). We also participated in reviewing a proposal by the Mile-High Conservation District to evaluate potential benefits of creating a Montana Water Trust, a private-non-profit entity that would be dedicated to facilitate market transactions to increase water dedicated to instream uses. In addition, one FWP lease inquiry (in the Madison basin) has turned into a conversion effort to which FWP staff are providing assistance. We encourage others to pursue leasing that we cannot or elect not to pursue, and hope there will be more opportunities for this type of cooperation in the future.

- **More systematic review.** We began work in 1999 to better document our criteria for review of leasing opportunities, both to be more accountable to those offering the leases, as well as to be able to provide such criteria in advance, thereby enhancing the viability of the inquiries we get. We are in the beginning stages of this effort, and look forward to reporting our progress on it to you next year. We are also in the discussion stages of a means to revamp our "Dewatered Streams" list into something that would be a more effective leasing

prioritization tool for us, as well as a helpful tool for others wishing to evaluate streamflow enhancement opportunities in their watersheds.

- **Staff transition.** 1998 and 1999 saw a major revision in staffing of FWP's instream flow program. Mr. Liter Spence, who has been addressing you for at least the last few Annual Reports, retired at the end of 1997, after 20 years with FWP. In addition, Mr. Fred Nelson, FWP's primary leasing negotiator, retired from FWP in May, 1999, after 25 years in FWP's Water Resources Program. With the assistance and support of other biologists and administrators at FWP, they built a leasing program that earned the respect of those participating, as well as earned the support of many previous detractors. Elements of these two positions were combined to form a new position, the Water Resources Program Manager, which was filled in April of 1999. We hope the staff transition can both build on their success, as well as lead us into a new era of leasing success.

- **Contract Monitoring.** 1999 was the first year we put flow monitoring and fry trapping associated with our Yellowstone leases out for competitive bid. The successful bidder carried out the monitoring over the summer, contacted the water commissioner or other administrative entity when low flows were noted, and coordinated with Helena and regional staff when necessary. A good snowpack, but low soil moisture conditions, in 1999 made for some competition for water. There were several instances (on two leases) whereby headgates needed to be adjusted to ensure flow levels could be met. It was invaluable to have a frequent presence in the basin to frequently check flow levels, and take action as necessary. Our Helena and regional field staff must divide their time as needed throughout their areas, on multiple issues, thus are not available on such a consistent, dedicated basis. We greatly appreciate the Legislature approving this in the Fisheries' contracted services budget.

IV. 1999 NEW AND RENEWED LEASES

FWP and lessors finalized three new leases in 1999, and renewed another. These are described below. The information required by statute for these leases is provided in Figure 1, following the descriptions.

Big Creek – New Leases (2)

Two leases on Big Creek (a tributary to the Yellowstone River near Corwin Springs) were finalized and implemented in 1999. Big Creek is used by native Yellowstone cutthroat trout from the Yellowstone River for spawning and rearing. Tributary dewatering is an important, if not the major, factor regulating numbers of adult cutthroat trout in the Yellowstone River. Because of shrinking distribution and declining numbers, the Yellowstone cutthroat trout is classified as a "Fish of Special Concern" in Montana and had been petitioned for listing under the federal Endangered Species Act (ESA).

This project proposed to rewater the lower mile of Big Creek by creating and then leasing "salvaged water" (see 85-2-419, MCA). Salvaged water was created by converting existing ditch/flood irrigation facilities operated by two south side landowners (Big Creek and Malcolm ranches) to a more efficient gravity fed pipeline and sprinkler system. In conjunction with converting to a more efficient irrigation system, a water lease was negotiated between FWP and the Malcolm Family, one of the south side landowners who holds a senior water right. In addition to the salvaged water, FWP leased a portion of the Malcolm's senior-most water right.

Additionally, a water lease was negotiated between FWP and the Bar X Ranch, a north side landowner and holder of the senior water rights on Big Creek. The Bar X Ranch created "salvaged water" by recently converting to a more efficient sprinkler irrigation system. The combined projects provide approximately 11 cubic feet per second (cfs) of water to the lower mile of Big Creek.

Funding for the projects was provided through the Future Fisheries Improvement Program. Project construction occurred in 1999, after "change" applications were approved by the DNRC. The lease was implemented and monitored in 1999, with excellent results.

Rock Creek (Near Garrison) – New Lease

Rock Creek flows northeast from Rock Creek Lake in the Flint Mountain Range for 10.6 miles before entering the Clark Fork River near Garrison. Irrigation diversions capture much of the creek's flow, completely dewatering the lower mile during much of the summer irrigation season.

Rock Creek supports resident populations of brown trout, the creek's predominant trout species, and brook trout and a few rainbow x cutthroat hybrids. Because lower Rock Creek is typically dry when brown trout from the Clark Fork River move into tributary streams to spawn, the creek receives virtually no use by brown trout spawners. Limited tributary spawning habitat is one factor that contributes to the low numbers of trout inhabiting the Clark Fork River.

Salvaged portions of six irrigation water rights held by the McGillis Ranch, which include the creek's 2nd and 3rd rights by priority, were leased. These rights are diverted at the creek's four lowermost irrigation diversions located within the lower mile of stream. The four diversions totally dewater the lower creek during much of the irrigation season.

The McGillis Ranch is converting from flood to sprinkler irrigation. Two gravity-fed pivots, using a combined flow of 3.83 cfs, are planned. The Ranch is funding a portion of the project. Additional funding is being provided through the Future Fisheries Improvement Program, administered by FWP. The grant award is FWP's contribution to the project. The salvaged water created by the project will be leased at no cost to FWP for instream use. In addition, the Ranch agreed to pass a minimum instream flow of 5 cfs in the event that salvaged water is insufficient to meet fishery needs. Construction has begun on the project, with the salvaged water expected to be created (i.e. project completed) in 2000.
The project should provide a continuous flow of water to the Clark Fork River, allowing river

brown trout to enter Rock Creek to spawn and young trout to rear before out-migrating to the river. Rewatering of Rock Creek could improve the recruitment of brown trout for the Clark Fork fishery and potentially contribute to the recovery of the river's fish populations.

Blanchard Creek – Renewed Lease

Blanchard Creek is a small stream that drains a southern extension of the Swan Mountains. It flows 13 miles south and east through low rolling morainal foothills to join the Clearwater River (a principal tributary to the Blackfoot River) at river mile 2.9, approximately 13 miles west of Ovando. Blanchard Creek feeds a section of the Blackfoot River that is dominated by rainbow trout. The bulk of rainbow reproduction for this river section occurs in lower reaches of south-flowing tributaries like Blanchard Creek. Most of these south-flowing tributaries also support spawning runs of cutthroat trout, bull trout and brown trout. The Creek contains both rainbow trout-dominated reaches (lower), and cutthroat trout-dominated reaches (upper).

Prior to FWP's lease of two of the three irrigation rights on the creek, Blanchard Creek was regularly flow-depleted from irrigation withdrawals along the lower 1.1 miles of the Creek. The lowest 200 yards (below the lowermost diversion) were almost always completely dry during late summer. In addition, fish were being lost to irrigation canals, and the existing diversion structures created fish passage barriers at low flows.

In 1989, FWP entered into an agreement whereby enough water would be left instream each year that at least 3 cfs would bypass the lower diversion point. FWP also agreed to design and install two new diversion structures to allow fish passage up and down the creek and to minimize fish loss to the canals. FWP also installed a flow measuring device at the lowermost diversion point.

Fish populations in the portion of the creek under lease have been monitored since 1990. As of 1998, densities of young-of-the-year rainbow trout improved almost five-fold, and densities of adult fish more than doubled, from 1990 levels. Additional species are now using the creek as well (i.e. species richness has increased).

The lease renewal retained the same flow threshold as the original lease. It also eliminated a complicated compensation calculation in favor of a straight payment and shifted maintenance responsibilities for the diversion structures to the lessors. Although the original lease envisioned only a 5-year potential renewal, when renewal time arrived, the lessors agreed to a 10-year renewal period.

Figure 1. Specific Statutorily-Required Information for 1999 New and Renewed FWP Instream Flow Leases

Statutorily-Required Reporting Element (abbreviated, see p. 1 for full text of reporting requirement)	**Response**
length of stream reach and how determined	**Big Creek:** The two leases rewater approximately the lower 1 mile of Big Creek. The length is determined by the distance between the diversions subject to the salvage projects creating the leased water, to the mouth of Big Creek. **Rock Creek (near Garrison):** The lease will rewater the lower 1.6 miles of Rock Creek. The length is determined by the distance between the new point of diversion for the pipeline, to the mouth of the Rock Creek. **Blanchard Creek (renewal):** The lease renewal will continue the flow benefits to the lower 1.1 miles of creek. The length is determined by the distance from the uppermost diversion affected by the lease, to the mouth of Blanchard Creek.
technical methods and data used to determine fishery needs	**Big Creek:** Prior to negotiating a instream leases on Big Creek, the lower creek regularly went dry due to irrigation withdrawals. A study conducted in 1998 and 1989 concluded that a flow of 11 cfs would cover most cutthroat redds (egg nests), and flow of 20 cfs covered all redds found in those two years. FWP therefore set a minimum instream flow goal of 11 cfs. This study used on-site redd counts and standard hydrographic techniques to draw these conclusions. The Big Creek Ranch lease was conditioned upon obtaining the Bar X lease, so the two would add to the minimum instream goal. **Rock Creek:** A series of cross-sectional measurements were taken in the affected reach in 1998. Information on substrate and longitudinal profile was also gathered. The cross-sectional measurements were entered into a hydraulic simulation model, and used with the profile and substrate information to determine minimum flows necessary to support food production for trout, as well as passage for migrating brown trout. The minimum flow of 5 cfs was determined to meet both goals. **Blanchard Creek:** Biologists used the Wetted Perimeter hydraulic simulation method to determine that approximately 3-4 cfs were necessary to sustain food production for trout in Blanchard Creek. Because only 3 cfs was considered available within the lease offer, that amount was deemed acceptable and has proven to provide fishery benefits.
determining and substantiating the amount of water available for lease	**Big Creek:** The U.S. Geological Survey (USGS) provided monthly percent exceedence flows for lower Big Creek at the former gauge site at stream mile 2.7. These estimates reflect the 1934-82 base period for this gauge, and represent undepleted flows of Big Creek immediately upstream from the diversions subject to the leases, and thus, water availability. **Rock Creek:** The USGS provided monthly percent exceedence flows for Rock Creek. In quantifying the amount of water available to lease, it was determined that historic use exceeded the amount claimed. Historic use was reconciled against claimed use, salvage water calculated (flow and volume), and all calculations described and defended in the Change Application to DNRC. **Blanchard Creek:** Significant effort went into substantiating the amount of water available when the lease was originally negotiated in the early 1990s. Being a renewal, no additional justification was provided.

Figure 1. Specific Statutorily-Required Information for 1999 New and Renewed FWP Instream Flow Leases

Statutorily-Required Reporting Element (abbreviated, see p. 1 for full text of reporting requirement)	**Response**
ensuring no adverse impact to other appropriators	**Big Creek:** For one of the lease agreements, only 1 cfs was considered fully "protectable" (due to seniority) downstream to the mouth, though 16 cfs came under lease. This means downstream appropriators have more water available than in the past. No objections were received on the Change Application. **Rock Creek:** Only one downstream diversion exists on Rock Creek, and it is currently in operable. The lease agreement, however, incorporated consideration of the unlikely event that this diversion was reactivated. Withdrawals through it would not limit benefits to the fishery, due to seniority of the rights leased and the small amount of flow associated with the defunct diversion. No objections were received to the Change Application. **Blanchard Creek:** No objections were submitted on the original Change Application for this lease (noticed in 1994). We are unaware of any complaints of adverse affect to other appropriators over the five years of this lease. The renewal will be noticed by DNRC, providing an opportunity for new issues to be raised.
monitoring water use under lease	**Big Creek:** A staff gauge was installed approximately ¼ mile downstream of the lowermost diversion associated with the lease. The gauge was calibrated using standard USGS hydrographic techniques and a rating curve developed. Flow monitoring and fry trapping was conducted by a contractor over the 1999 lease season. **Rock Creek:** Two staff gauges will be installed in Rock Creek in 2000, one above the new (pipeline) diversion, and one below. In addition, the hours of operation of the new irrigation system will be reported to FWP, and the resulting flow and water use information will be reported to DNRC at the end of each of the first two years of operation, and upon request thereafter. FWP biologists will conduct population sampling (electrofishing) regularly to determine use of the leasing reach by fish. Other biological monitoring may be invoked as determined by regional fishery management goals. **Blanchard Creek:** A staff gauge was installed at the lower diversion point. The lessor reads the gauge to ensure flows stay above or at the negotiated lease level. FWP personnel also check the gauge intermittently over the lease period. Electrofishing surveys, using the 2-pass depletion method, have been conducted on the Creek since 1990 to provide indications of fish use of the lease reach.

V. DESIGNATED STUDY STREAMS

Montana statutes require FWP to obtain approval of the commission and DNRC to study a stream for leasing (and thereby lease from it). Figure 2 lists the study streams approved to date, their relevant basins, the status of the approval, and the status of leasing on them. Statutory revisions in 1999 increased the allowed number of study streams from 20 to 40.

Figure 2. Status of Designated Study Streams and Leasing

Study Stream	Basin	Status of Request	Status of Leasing in Reach
1. Swamp Creek	Big Hole River	final approval 3/5/90	no lease; FWP and right holder could not reach agreement on price for lease
2. Big Creek	Yellowstone River	final approval 3/5/90	two leases finalized in 1999
3. Mill Creek	Yellowstone River	final approval 11/9/90	three leases
4. Cedar Creek	Yellowstone River	final approval 1/6/92	lease
5. Blanchard Creek	Blackfoot River	final approval 9/25/92	lease
6. Hells Canyon Creek	Jefferson River	final approval 9/25/92	lease
7. Tin Cup Creek	Bitterroot River	final approval 10/30/92	lease; working on renewal
8. Rattlesnake Creek	Clark Fork	final approval 5/25/95	no lease; negotiations on hold
9. Mol Heron Creek	Yellowstone River	final approval 11/28/95	lease
10. Rock Creek	Blackfoot River	final approval 11/28/95	TU finalizing lease implementation, using past FWP information
11. Chamberlain Creek	Blackfoot River	final approval 1/3/96	lease
12. Pearson Creek	Blackfoot River	final approval 1/3/96	lease
13. Rock Creek, near Garrison	Clark Fork River	final approval 7/15/98	lease finalized in 1999
14. Little Prickly Pear	Missouri River, above Holter dam	approved by Commission 11/8/99; not yet submitted to DNRC	project planning
15. Blackfoot River, mainstem	Blackfoot River	Commission approval to be requested at 1/12/00 Commission meeting	project planning

VI. GOALS FOR 2000

In looking forward to 2000, we are hoping to survive Y2K and that Montana will experience normal or slightly higher precipitation and snowpack. In addition, we have specific and continued goals we hope to achieve in 2000, described below.

- **New leases.** We hope we can report to you on several more leases completed in 2000, and the renewal of the Tin Cup lease.

- **More coordination.** We look forward to enhanced coordination with NRCS, the U.S. Fish and Wildlife Service, Conservation Districts, and others to enhance understanding of the program state-wide, and the integration of this tool into planning and restoration efforts by others.

- **Improved coordination with water commissioners/District Court judges.** The idea of enforcing the maintenance of water instream has been variously accepted by water commissioners charged by District Courts to enforce water rights on various streams. On streams that are heavily appropriated, water commissioners often have to act extremely quickly when flows fall near or below lease levels, to ensure they are accurately enforcing the rights on the stream (including the lease). Two streams from which we lease (one in the Yellowstone basin and one in the Bitterroot basin) regularly have commissioners assigned to them. We feel that this year, more than in the past, we had better cooperation from the commissioners assigned to these streams. They have been willing to endure very confrontational situations to ensure the leases are fulfilled. (Granted, similar confrontations existed on these streams before we entered a lease, but the lease added one more complication to their lives…!) We very much appreciate their assistance, but feel there is room for improvement.

  We are working with DNRC to potentially include water leasing information in the training sessions they conduct for water commissioners. We feel there is room for improvement in commissioner understanding that a leased right is equally enforceable as a diversionary right – in order of priority. Since we are dependent on commissioners to enforce our leases in some streams, their knowledge of related responsibilities, and an opportunity to get their questions answered prior to the irrigation season could greatly benefit their ability and commitment to enforcing instream leases. Also, since they are in contact with many water users, their knowledge might generate additional lease opportunities.

- **Additional flow opportunities for Mill Creek.** This creek in the Yellowstone basin was the first location of FWP leases. Our investment in the basin is significant, but the complexity of the water use causes administration challenges. Being a "losing" stream (i.e. water sinks into the streambed as it moves downstream), our enforceable lease amount is likely near the minimum necessary to ensure fry survival. If water levels fall below that level for even 48 hours while eggs are incubating, a year of fry production can be lost. We acknowledge that there are administrative delays in correcting flows to bring them above the lease level – the low level must be noted from the staff gauge, the message must be relayed to the commissioner, the commissioner must determine how to correct the problem, get out to the appropriate diversion(s), correct the problem, and the flows must get downstream to register on the gauge. Even with the frequency that the Mill Creek gauge was being checked in 1999, the critical 48-hour period was exceeded, and fry production from Mill Creek was

disappointing. To justify our investment in this drainage, we need to enhance response time and negotiate additional flows that would add a margin of safety to our leases in the Mill Creek drainage.

We look forward to reporting to you our progress on the achievement of these goals, as well as overall leasing progress, in 2000.

APPENDICES

Appendix A. Features of Montana Fish, Wildlife & Parks Instream Water Leases – October, 1999

SOURCE	LESSOR	LEASE TERM/EXP.	PRIORITY OF RIGHT	QUANTITY LEASED	PERIOD OF USE	COST
Mill Creek	Mill Creek Water and Sewer District	10 years Aug. 1, 2003	95 rights with various priorities	41.4 cfs	48-60 hours in Aug. Diversion shut off after 10-day notice from FWP	$12, 750 per year[1]
Mill Creek	Individual	10 years April 1, 2003	June 30, 1880; June 1, 1903	2.0 cfs (1880) and 4.13 cfs (1903) (salvaged water)	May 1 -October 4	$7,500 per year
Blanchard Creek	Individual	10-year renewal June 20, 2009	May 11, 1913 (first right on stream)	3.0 cfs	April 15 -October 15	$2,000 per year
Tin Cup Creek	Six individuals	5 years Nov. 4, 1999	August 1, 1883 (first right on stream)	2.28 cfs April 1-April 14 4.32 cfs April 15-April 30 4.72 cfs May 1-October 19 1.8 cfs October 20-November 4	April 1- November 4	$6,260 per year
Cedar Creek	US Forest Service	10 years Sep. 20, 2005	April 1, 1890; April 1, 1893; April 1898; April 1, 1904; April 7, 1972 (high water rights only)	6.77 cfs May 1-July 15[2] 6.39 cfs July 16-July 31 9.64 cfs August 1-August 31 6.39 cfs Sept 1 - October 15	May 1-October 15	$1.00 per year
Hells Canyon Creek	Three individuals	20 years Apr. 1, 2016	December 31, 1884 (first right on stream), August 23, 1889; August 29, 1912	1.12 cfs (salvaged water)	April 1- November 4	$45,000 - One-time payment
Mill Creek	Individual	10 years May 1, 2006	June 1, 1891	2.64 cfs (salvaged water)	May 1-October 19	$4,200 per year
Chamberlain Creek	Individual	10 years Apr. 1, 2007	October 10, 1911	½ the flow up to 25 cfs	April 1 - October 31	$1.00 per year
Pearson Creek	Individual	10 years Apr. 1, 2007	October 10, 1911	Up to 8 cfs	April 1 - October 31	$1.00 per year
Cottonwood Creek	FWP[3]	9 years June 30, 2005	May 1, 1884	14.0 cfs April , 37.0 cfs May 1-June 30, 32.0 cfs July, 9.0 cfs August, 6.0 cfs Sept., 9.0 cfs Oct., 8.0 cfs November (salvaged water)	April 1- November 4	None
Mol Heron Creek	Private ranch	20 years Dec. 31, 2018	July 15, 1884; May 7, 1885; June 15, 1893; January 1, 1900; March 2, 1903; June 5, 1905; August 5, 1920; April 15, 1967	5.0 cfs to 27.0 cfs	April 15 - October 19	$100,000 - one-time payment
Big Creek	Two private ranches[4]	20 years April 15, 2020	March 12, 1883; June 30, 1901; May 31, 1909; May 15, 1910; May 15, 1910	1.0 – 16.0 cfs	April 15 - October 15	$228,640 - one-time payment
Big Creek	Private ranch	10 years May 1, 2009	June 30, 1873 (first right on stream)	10.0 cfs	May 1 - November 1	$8,000 per year
Rock Creek	Private ranch	20 years	March 23, 1881; May 15, 1881; June 1, 1892; May 1, 1898; September 29, 1904; May 10, 1907	5.0 - 27.22 cfs	April 15 - October 31	$138,346 - one-time payment

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[1] Lessor pays for water commissioner and the installation of measuring devices on all on-farm turnouts from the pipeline.

[2] These rights are used to maintain a flow of 1.3 cfs at the mouth of Cedar Creek, eliminating effects on other water users.

[3] FWP converted its own water rights to instream flow under 85-2-439, MCA.

[4] Ranches transferred their rights to the Montana Land Reliance, who is the lessor.

Appendix B. FWP Instream Flow Lease Objectives
(a.k.a. "maximizing the 4 'A's")

- **Advantageous** to the fishery

  Attractive leasing opportunities are those that address a stream flow problem that significantly limits potential fishery values.

- **Actual** water dedicated to instream flows

  Leases must involve valid water rights, and quantities leased should be large enough to benefit the stream.

- **Administrable** by the Department or other appropriate entity

  Leases should involve a reasonable combination of water right seniority and advantageous location so that the instream flow contribution can be ensured and defended through the lease period. Decreed streams and/or an existing water commissioner are an added plus.

- **Affordable**

  Do the benefits to the fishery justify the cost of the lease or the project creating the leasing opportunity?

Contact Montana Fish, Wildlife & Parks' (FWP) Water Resources Program Manager at 406-444-3888, or your local FWP Fish Biologist, for more information.